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No. 80-767

In the Supreme Court of the United States

OCTOBER TERM, 1980

UNITED STATES OF AMERICA, APPELLANT

v.

EDWIN D. LEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether Sections 3101, 3102, 3111 and 3301 of the Internal Revenue Code of 1954 (26 U.S.C.), which impose certain social security taxes on employers and employees, are constitutional as applied to persons who object, on religious grounds, both to the payment of taxes levied to support such benefits and to the receipt of such benefits.

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BRIEF FOR THE UNITED STATES

OPINION BELOW

The findings of fact and conclusions of law of the district court (J.S. App. 1a-8a) are reported at 497 F. Supp. 180.

JURISDICTION

The judgment order of the district court was entered on July 15, 1980 (J.S. App. 9a). A notice of appeal to this Court was filed on August 14, 1980 (J.S. App. 10a), and the Court noted probable jurisdiction on March 23, 1981 (A. 26). The jurisdiction of this Court rests on 28 U.S.C. 1252, which authorizes a direct appeal to this Court from a final judgment of a court of the United States holding an

Act of Congress unconstitutional in a civil action to which the United States is a party. A direct appeal lies where, as here, a statute is held unconstitutional as applied to particular circumstances. *Fleming* v. *Rhodes*, 331 U.S. 100 (1947); see *United States* v. *Christian Echoes Ministry, Inc.*, 404 U.S. 561, 563 (1972); *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974).

STATUTES INVOLVED

Sections 1402(g), 3101, 3102, 3111 and 3301 of the Internal Revenue Code of 1954 (26 U.S.C.) are set forth in the Appendix, *infra*, 1a-6a.

STATEMENT

1. Appellee is a member of the Old Order Amish religious sect. That sect seeks to preserve a way of life emphasizing the welfare of their religious community. A major tenet of the Old Order Amish faith is that each member must provide for the other members of the community who are in need of economic assistance. Because Old Order Amish members care for their aged, their sick, and their unemployed, they do not need any form of social welfare benefits from outside their self-sufficient community. Moreover, the Old Order Amish believe that it is a sin either to accept social security benefits or to pay social security taxes. Accordingly, members of the sect are not permitted by their religious beliefs to accept any benefits under the social security system, such as assistance for old age, death, disability or medical expenses (J.S. App. 3a). As the district court found, "[n]ot only is it considered a sin to *accept*, it is also considered a sin to *pay*, for to pay is to deny their faith" (*ibid.*; emphasis in original).

The social security system was established in 1935 by the Social Security Act, ch. 531, 49 Stat. 620, to provide a system of old age and unemployment benefits. The social security benefits are supported by various taxes, including a tax imposed by the Federal Insurance Contributions Act (FICA) on employees with respect to their wages (26 U.S.C. 3101),[1] an excise tax imposed by that Act on employers with respect to wages paid their employees (26 U.S.C. 3111), and a second excise tax imposed by the Federal Unemployment Tax Act (FUTA) on employers with respect to wages paid to employees (26 U.S.C. 3301).[2] In 1950, Congress extended the federal social security system to cover self-employed persons, and a concomitant tax on self-employment income to fund that coverage was enacted. See Social Security Act

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[1] The employer is required, pursuant to Section 3102(a) of the Code, to withhold the employee's tax from wages, and is liable for payment of that tax under Section 3102(b), whether or not he withholds the requisite amounts from his employees' wages.

[2] The Federal Unemployment Tax Act (FUTA), which is codified as Sections 3301 through 3311 of the Internal Revenue Code, is a coordinated federal-state unemployment compensation program. Section 3301 imposes an excise tax on most employers, now equal to 3.2 percent of the first $6,000 of wages paid each employee. Section 3301 and 3306(b)(1) of the Code. Under Section 3302, however, an employer is permitted to claim a credit against the FUTA tax for the employer's contributions to an unemployment fund maintained under state law, as long as the state's unemployment compensation law has been certified by the Secretary of the Treasury. Section 3302(a)(1). A certified state receives two kinds of federal grants related to its unemployment security program. One is the grant for the costs of administering the state's unemployment compensation program. 42 U.S.C. 501 through 503. The other is the grant for the administration of public employment offices. 29 U.S.C. 49 through 49n.

Amendments of 1950, ch. 809, Section 208(a), 64 Stat. 540, 26 U.S.C. (1952 ed.) 480 and 481.

In 1965, Congress added Section 1402(h) to the Internal Revenue Code. That section allows an exemption from the self-employment tax to persons who, by reason of their adherence to the established tenets or teachings of (and membership in) a "recognized religious sect or division thereof," are "conscientiously opposed to acceptance of the benefits of any private or public insurance" providing death, disability, old age, retirement or medical benefits.[3] This exemption is granted, however, only where the applicant waives all benefits under the Social Security Act (whether based on self-employment income or wages received as an employee) and where the Secretary of Health and Human Services has determined (1) that the particular sect has the requisite tenets or teachings; (2) that the sect has had, for a substantial period, the practice of making reasonable provision for its dependent members; and (3) that the sect has been in existence at all times since December 31, 1950.[4]

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[3] This statutory exemption originally designated as Section 1402(h) of the 1954 Code, was added to the Code by Section 319(c), of the Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 391. Section 1402(h) of the Code was redesignated as Section 1402(g) by Section 1901(a)(155)(B) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1789.

[4] Section 1402(e) of the Code also grants an exemption from the self-employment tax to ordained, commissioned or licensed ministers, certain members of religious orders and Christian Science practitioners who are opposed to the receipt of social security benefits on the grounds of conscience or religious principle. Prior to 1967, the exemption was automatic. It must now be affirmatively claimed, however, and applies only with respect to earnings derived from services performed as "such minister, member, or practitioner."

The legislative history shows that, in enacting the exemption in Section 1402(g), Congress specifically intended to benefit members of the Old Order Amish sect. It found the exemption justifiable where individual members of such a sect "cannot accept the benefits of insurance, including social security benefits, without renouncing basic tenets of * * * [their] religion" and "sincerely believe that payment of social security taxes is irreconcilable with their religious convictions." H.R. Rep. No. 213, 89th Cong., 1st Sess. 101-102 (1965). The proposal, however, was limited to the self-employment tax imposed by Section 1401 because Congress understood that such individuals, by reason of their religious beliefs, "limit their work almost entirely to farming and to certain other self-employment" (*ibid.*). Thus, Congress provided no statutory exemption from the employer and employee FICA taxes and the employer FUTA taxes at issue in this case. The applicability of FICA and FUTA with respect to wages that might be paid to such individuals was left undisturbed by the 1965 legislation.

2. During 1970-1977, appellee employed several other members of the Old Order Amish sect who worked on his farm and in his carpentry shop. He did not, however, either withhold income taxes or FICA taxes from their wages, or pay FUTA taxes or the employer's share of FICA taxes with respect to those wages. In 1978, the Internal Revenue Service assessed appellee for unpaid employment taxes for the years in issue in an amount exceeding $27,000. Appellee paid taxes in the amount of $91 attributable to wages paid to his employees for the first quarter of 1973. He thereafter instituted this proceeding in the United States District Court for the Western District of

Pennsylvania for a refund of the amount paid and for injunctive relief against the Commissioner of Internal Revenue with respect to the unpaid balance of the assessments. Appellee claimed that the imposition of FICA and FUTA taxes on the wages paid his fellow members of the Old Order Amish sect violated both his own rights and the rights of his employees under the Free Exercise Clause of the First Amendment of the Constitution (J.A. App. 1a-2a).[5]

The district court upheld appellee's claim.[6] It concluded that "the tax is declared invalid and unconstitutional" (J.S. App. 8a) on the ground that it infringed appellee's First Amendment right to free exercise of religion. In support of its ruling, the court relied upon the exemption provided by Section 1402(g) of the Code, even though that exemption relates only to the tax on income from self-employment and not to the employer's share of FICA and FUTA taxes on employees' wages or to the employees' share of the FICA taxes. It accordingly ruled that appellee "and employers who fall within the carefully circumscribed definition provided in 1402(g), are relieved from paying the employer's share of FICA and FUTA as it is an

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[5] The portion of the assessment representing income taxes required to be withheld from wages is not in issue in this case; it is to be abated because appellee's employees paid their own income taxes.

[6] The district court denied appellee's request for injunctive relief against the collection of the balance of the assessment because of the bar of the Anti-Injunction Act (26 U.S.C. 7421(a)) against such actions. It did so, however, "with the knowledge that the government has agreed not to collect such taxes during the pendency of this litigation and in the belief that the future collection activities will be circumscribed by the holding of this case" (J.S. App. 8a).

unconstitutional infringement upon the free exercise of their religion" (J.S. App. 8a).[7]

SUMMARY OF ARGUMENT

1. The judgment of the district court—holding unconstitutional the imposition of certain social security taxes upon appellee and his employees—has erroneously nullified an Act of Congress on grounds that have no basis in the decisions of this Court construing the Free Exercise Clause of the First Amendment.

The district court held that appellee, and similarly-situated employers who are members of the Old Order Amish, and who are conscientiously opposed to acceptance of any private or public insurance, are relieved from the payment of the employer's share of FICA taxes and FUTA taxes. But this conclusion cannot be squared with this Court's decisions construing the Free Exercise Clause of the First Amendment. To be sure, the Free Exercise Clause affords substantial protection for the diverse religious beliefs and practices in this country. This Court has held that the Free Exercise Clause prohibits governmental regulation of religious beliefs as such (*Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940)), or governmental interference with the dissemination of religious ideas. See, *e.g.*, *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953);

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[7] While the district court did not expressly conclude that the obligation to withhold the employees' share of FICA taxes from their wages, as required by Sections 3101 and 3102 of the Code, was also contrary to the First Amendment rights of the appellee or his employees, it implicitly so held since it recognized (J.S. App. 1a, 9a) that those taxes were also at issue here, and awarded a refund of the entire amount assessed and paid for the quarter in question.

Follett v. *Town of McCormick*, 321 U.S. 573 (1944). It also prohibits misuse of secular government programs "to impede the observance of one or all religions or * * * to discriminate invidiously between religions, * * * even though the burden may be characterized as being only indirect." *Braunfeld* v. *Brown*, 366 U.S. 599, 607 (1961). "And even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of Government's valid aims." *Gillette* v. *United States*, 401 U.S. 437, 462 (1971); see, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

It is equally well-established, however, that a person is not protected from every incidental burden on the exercise of his religion that may result from the implementation of a neutral, secular governmental interest. *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 602; *Johnson* v. *Robison*, 415 U.S. 361, 383-386 (1974); *Gillette* v. *United States*, *supra*, 401 U.S. at 461-462; see *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Reynolds* v. *United States*, 98 U.S. 145 (1878); *McDaniel* v. *Paty*, 435 U.S. 618, 635 n.8 (1978) (Brennan J., concurring in the judgment). See also *Wisconsin* v. *Yoder*, *supra*; *Johnson* v. *Robison*, *supra*. Accordingly, this Court has observed that a generally imposed income tax does not have a prohibited coercive effect on religious practices or beliefs. *Follett* v. *Town of McCormick*, *supra*, 321 U.S. at 577-578; *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943); see *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 606. Indeed, one can hardly imagine a more neutral secular activity that the payment of generally imposed

taxes such as the FICA and FUTA levies at issue here.

Sherbert v. *Verner*, 374 U.S. 398 (1963), and *Wisconsin* v. *Yoder*, *supra*, upon which the district court relied (J.S. App. 5a-8a), are therefore distinguishable. In both of these cases, the infringement on the exercise of the individual's religion was far more burdensome, in the face of a less compelling government interest, than here. In *Sherbert*, a member of the Seventh-Day Adventist Church was discharged by her employer because she would not work on Saturday, the Sabbath Day of her faith. She was unable to obtain other employment in the vicinity where she lived because of her religious belief that she could not work on Saturday. South Carolina denied the appellant's claim for unemployment benefits on the ground that she failed without reasonable cause to accept available employment. This Court held that disqualification of a Seventh-Day Adventist from unemployment compensation solely because of her refusal to accept employment in which she would have to work on Saturday violated the Free Exercise Clause. The appellant in *Sherbert* was faced with a constitutionally unacceptable choice. She had to give up either her Sabbath Day or her economic means of survival. A similar choice was involved in *Thomas* v. *Review Board*, No. 79-952 (Apr. 6, 1981), in which the petitioner terminated his employment when he was assigned to armament production. Appellee faces no similar choice here.

Similarly, in *Yoder*, this Court upheld the claim of members of the Old Order Amish sect that enforcement against them of a state compulsory formal ed-

ucation requirement after the eighth grade would violate the free exercise of their religion. The interest of the state in requiring an additional one or two years of formal high school attendance was deemed insufficient against the claim that state formal education during the crucial adolescent years would expose the children to worldly influences, and thereby threaten the religious survival of the Old Order Amish parents as well as their children. The choice faced by the Amish parents in *Yoder* thus was either to risk losing their children from their faith or to violate the law. No such choice need be made here. Although appellee claims that the payment of the tax would be a sin, it does not, as did the burdens in *Sherbert* and *Yoder*, threaten the integrity of his religious beliefs or observances. See also *McDaniel* v. *Paty, supra; Torcaso* v. *Watkins*, 367 U.S. 488 (1961).

2. The district court found that members of the Old Order Amish sect consider it to be a sin to accept social security benefits and to pay social security taxes because "it is a sin to fail to provide for or to allow another to provide for your own people" (J.S. App. 3a). But the payment of FICA and FUTA taxes does not prevent appellee from providing for his own people, nor are he or any of his employees forced to accept social security benefits. The Old Order Amish can protect the integrity of their own religious beliefs and practices simply by declining to accept social security benefits and by continuing to provide support for those members of their community who are in need. The payment of FICA and FUTA taxes no more commits appellee or other members of

the Old Order Amish sect to a binding insurance contract in violation of their religious beliefs than does the payment of federal income taxes, which are used to support a myriad of governmental expenditures and benefits, many of which they or various other religious groups may oppose. See *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974).

Finally, in contrast to the very limited effect that FICA and FUTA taxes have on the exercise of appellee's religion, the governmental interest in maintaining widespread participation in the social security program is of great importance. The government's ability to maintain a comprehensive social security program for the nation's unemployed and senior citizens would be severely strained if all those who could provide for themselves, either by individual or community efforts, could voluntarily withdraw from the program. The Free Exercise Clause has never been construed to interfere with such a fundamental societal activity as the levying of generally imposed federal taxes.

3. Contrary to the reasoning of the district court, the Section 1402(g) religious exemption from the tax on self-employment income does not support appellee's claim to exemption from the employer's tax on wages. Since Section 1402(g) was enacted, there have been various constitutional challenges by taxpayers who sought either to have the statute set aside or to have the exemption extended to themselves, despite their failure to satisfy all of its conditions. But the courts have uniformly rejected these claims. The courts that have reached the question have concluded that the exemption pro-

vided by Section 1402(g) is constitutionally permissible and, until the decision below, no court has ever suggested that it is constitutionally required under the Free Exercise Clause.

Thus, while Congress as a matter of legislative grace may have permissibly made this accommodation to the religious beliefs and social practices of members of the Old Order Amish sect, it is not compelled to do so by the Free Exercise Clause or any other provision of the Constitution. Once having granted this statutory exemption from the tax imposed by Section 1401 on income from self-employment, Congress was under no constitutional compulsion to extend a similar exemption to employers and employees from the FICA and FUTA taxes imposed by Sections 3101, 3111 and 3301 of the Code.

The limitation in the Section 1402(g) exemption to the self-employment tax is in accord with the decisions of this Court holding that Congress has considerable discretion in the classification of taxpayers in implementing the social security system. *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495 (1937); *Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937). Self-employed persons were generally not covered by the social security system at all until 1950 (Social Security Act Amendments of 1950, ch. 809, Section 208(a), 64 Stat. 540), and even now self-employed persons are taxed on a substantially different basis from employed individuals. Sections 1401 and 1402. In light of the decisions in *Helvering* v. *Davis*, 301 U.S. 619 (1937); *Carmichael* v. *Southern Coal Co.*, *supra*, and *Steward Machine Co.* v. *Davis*, *supra*, it could hardly be contended that the distinction drawn between self-employed persons and em-

ployees under either the original provisions of the Social Security Act or its present provisions is unconstitutional. The specific distinction drawn in Section 1402(g) between self-employed adherents of the Old Order Amish sect and members of that sect who employ or are employed by others is no more suspect as a matter of either Due Process or First Amendment considerations, than the distinctions that have been drawn between employed and self-employed persons generally.

The classification made in Section 1402(g) involves at most a difference in the tax treatment accorded employed and self-employed members of the same religious sect. Moreover, since appellee himself is treated in precisely the same manner, with respect to the FICA and FUTA taxes in question, as any other similarly situated employer, regardless of his religious beliefs, he can hardly complain that, as to himself, Section 1402(g) reflects an improper classification under either the Due Process Clause or the Free Exercise Clause.

At all events, we submit that Congress had a rational basis for limiting the Section 1402(g) exemption to the tax imposed on self-employment income under Section 1401 of the Code. The legislative history of Section 1402(g) shows that Congress was concerned that there should be no broad exception to the strongly held policy against making participation in the social security system a voluntary matter. Thus, the exemption was limited to the self-employment tax "since those persons for whom the payment of social security taxes appears to be irreconcilable with their religious convictions also, by reason of their religious beliefs, limit their work almost entirely to farming and to certain other self-employment." H.R.

Rep. No. 213, 89th Cong., 1st Sess. 101-102 (1965). Moreover, the limitation of the Section 1402(g) exemption to self-employment taxes is a reasonable classification because it distinguishes between self-employed persons, who are most likely to possess the economic resources necessary to provide for themselves, and wage earners whose support may be dependent on someone else (and who are free to change their religious affiliation if they so desire). The government is not constitutionally required to exclude those wage earners and their survivors from social security coverage in favor of anticipated care for their needs by their religious community, thereby arguably coercing them economically to maintain their religious affiliation (in tension with Establishment Clause values).

In sum, Section 1402(g) represents a reasonable compromise between the interest of the government in insuring maximum participation in, and contribution to, the social security system, on the one hand, and the possibly conflicting beliefs of certain religious groups, on the other. *Committee For Public Education* v. *Nyquist*, 413 U.S. 756, 788 (1973). In attempting to implement purely neutral, secular goals through the social security system, Congress has tried to minimize, as a matter of legislative grace, otherwise justifiable burdens on members of religious groups like the Old Order Amish, without transgressing the restrictions of the Establishment Clause. The balance it has struck does not violate the First Amendment rights of appellee or the other members of the Old Order Amish sect whom he employs.

ARGUMENT

THE PAYMENT OF SOCIAL SECURITY TAXES BY EMPLOYERS AND EMPLOYEES WHO ARE MEMBERS OF THE OLD ORDER AMISH SECT DOES NOT VIOLATE THEIR FIRST AMENDMENT RIGHT TO THE FREE EXERCISE OF THEIR RELIGION EVEN THOUGH THEY MAY OBJECT ON RELIGIOUS GROUNDS TO THE PAYMENT OF SUCH TAXES AND THE RECEIPT OF SOCIAL SECURITY BENEFITS

A. The district court's ruling is contrary to this Court's decisions interpreting the Free Exercise Clause of the First Amendment

1. The judgment of the district court—that portions of Sections 3101, 3102, 3111 and 3301 of the Internal Revenue Code of 1954 are unconstitutional as applied to appellee and his employees because of their religious opposition to the social security program and the taxes levied to support it [8]—is contrary to this

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[8] As pointed out (*supra*, page 6, note 6), the district court declined to grant the injunctive relief sought by appellee because of the bar of the Anti-Injunction Act, 26 U.S.C. 7421(a). It is not entirely clear, however, whether the court intended to grant declaratory relief with respect to these taxes. In our view, such declaratory relief would likewise be proscribed by the federal tax exception set forth in the Declaratory Judgment Act, 28 U.S.C. 2201. See *Alexander* v. *Americans United, Inc.*, 416 U.S. 752, 759 (1974); *Bob Jones University* v. *Simon*, 416 U.S. 725, 732-733 n.7 (1974); see also *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974). Unlike the taxpayers in those cases, appellee also sought a refund of taxes paid pursuant to 28 U.S.C. 1346(a)(1). Employment taxes are considered "divisible." Hence, payment of the full amount of employment taxes assessed is not a prerequisite to maintaining such a refund suit. Rather, only the taxes attributable to one employee for one quarter need be paid for this purpose. See *Flora* v. *United States*, 362 U.S. 145, 171 n.37 (1960); *Boyn-*

Court's decisions interpreting the Free Exercise Clause of the First Amendment. As we shall show, the decision below cannot logically be limited either to members of the Old Order Amish sect or to the specific taxes involved in this proceeding. If the government's power to levy generally imposed taxes must yield to the religious beliefs of the particular individuals in this proceeding, then it presumably must also yield to the sincere religious beliefs of any other taxpayer who may oppose on religious grounds the payment of these or other taxes. Our system of taxation could not produce the required revenues if the social welfare and other policies of the government were required to be consistent with the religious beliefs of each individual taxpayer. Here, the taxes at issue impose a minimal and incidental burden upon the exercise of appellee's and his employees' religious beliefs. In these circumstances, appellee's religious objections must yield to the specific public interest in maintaining the financial integrity of the revenues and the social security system.

It is, of course, well settled that the Free Exercise Clause of the First Amendment affords substantial protection for the diverse religious beliefs and practices in this country. This Court has held that the Free Exercise Clause prohibits governmental regulation of religious beliefs as such (*Cantwell* v. *Connecticut*, 310 U.S. 296, 303 (1940)), or governmental interference with the dissemination of religious ideas.

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ton v. *United States*, 566 F.2d 50, 52 (9th Cir. 1977). Thus, the district court had jurisdiction to consider appellee's constitutional arguments in support of his refund claim. It is, however, questionable whether appellee has standing to raise any constitutional objections to those taxes on behalf of his employees. See *infra*, page 21, note 10.

See *Fowler* v. *Rhode Island*, 345 U.S. 67 (1953); *Follett* v. *Town of McCormick*, 321 U.S. 573 (1944). It also prohibits misuse of secular governmental programs "to impede the observance of one or all religions or * * * to discriminate invidiously between religions, * * * even though the burden may be characterized as being only indirect." *Braunfeld* v. *Brown*, 366 U.S. 599, 607 (1961). The Court has also noted that "even as to neutral prohibitory or regulatory laws having secular aims, the Free Exercise Clause may condemn certain applications clashing with imperatives of religion and conscience, when the burden on First Amendment values is not justifiable in terms of the Government's valid aims." *Gillette* v. *United States*, 401 U.S. 437, 462 (1971); see, *e.g.*, *Wisconsin* v. *Yoder*, 406 U.S. 205 (1972).

It is equally well established, however, that a person is not protected from every incidental burden on the exercise of his religion resulting from the implementation of a neutral, secular governmental interest. *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 603; *Johnson* v. *Robison*, 415 U.S. 361, 383-386 (1974); *Gillette* v. *United States*, *supra*, 401 U.S. at 461-462; see *Prince* v. *Massachusetts*, 321 U.S. 158 (1944); *Reynolds* v. *United States*, 98 U.S. 145 (1878). In determining whether a particular statute is supported by a governmental interest that outweighs a person's free exercise of rights, it is necessary (*McDaniel* v. *Paty*, 435 U.S. 618, 635, n.8 (1978) (Brennan, J., concurring in the judgment))—

> to balance the importance of the secular values advanced by the statute, the closeness of the fit between those ends and the means chosen, and the impact an exemption on religious grounds would have on the State's goals, on the one hand, against the sincerity and centrality of the ob-

> jection to the State's goals to the sect's religious practice, and the extent to which the governmental regulation interfered with that practice, on the other hand.

See *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 214 (the interest of the government is subject to "a balancing process when it impinges on fundamental rights * * * such as those specifically protected by the Free Exercise of the First Amendment"); *Johnson* v. *Robison*, *supra*; *Gillette* v. *United States*, *supra*. "To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, *i.e.*, legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature." *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 606. Accordingly, this Court has repeatedly observed that a generally imposed income tax does not have a prohibited coercive effect on religious practices or beliefs. *Follett* v. *Town of McCormick*, *supra*, 321 U.S. at 577-578; *Murdock* v. *Pennsylvania*, 319 U.S. 105, 112 (1943); see *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 606.

The indirect burden imposed on the exercise of appellee's religion as a result of the imposition of the social security taxes at issue here is minimal when compared to those cases where the individuals' interest freely to exercise his religion has prevailed over the competing governmental interest. This is not a case where a person was required to choose between a complete forfeiture of unemployment benefits and her day of worship (*Sherbert* v. *Verner*, 374 U.S. 398 (1963)), between the forfeiture of such benefits and adherence to his religious principles regarding employment in the production of weapons (*Thomas* v. *Review Board*, No. 79-952 (Apr. 6,

1981)), or between holding political office and pursuing a religious vocation (*McDaniel* v. *Paty, supra*). Nor is this an instance where a person is required to swear before a God not of his choice as a condition of public office (*Torcaso* v. *Watkins*, 367 U.S. 488 (1961)), or where the members of a sect are subject to compulsory public education requirements and therefore forced to expose their children to what they consider worldly influences dangerous to their religious beliefs (*Wisconsin* v. *Yoder, supra*). Indeed, one can hardly imagine a more neutral and secular activity—or one that is any less burdensome on the free exercise of religion—than the payment of generally imposed taxes.

The district court's reliance on *Wisconsin* v. *Yoder* and *Sherbert* v. *Verner* (J.S. App. 5a-8a) is therefore misplaced. In both of those cases, the burden on the exercise of the individual's religious beliefs was far greater, and imposed in the face of a far less compelling government interest, than here. In *Yoder*, this Court upheld the claim of members of the Old Order Amish sect that enforcement of a state statute requiring an additional one or two years of formal high school attendance would violate the free exercise of their religion. That holding, however, does not insulate members of the Old Order Amish from the fiscal burdens that a civilized and pluralistic society may impose on its citizens simply because they may disagree with the objectives that society, through its duly constituted political institutions, has chosen to pursue, or with the manner in which it has chosen to pursue them.[9]

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[9] The appropriate accommodation between the beliefs of the Old Order Amish and the demands of our society is aptly illustrated by *Slabaugh* v. *United States*, 474 F.2d 592

The burden on religion considered in *Yoder* is not comparable to the generally imposed social security taxes at issue here. In *Yoder*, this Court found that the Wisconsin mandatory school attendance statute threatened the very existence of the Old Order Amish sect because its adherents could not compromise the belief in question without being "assimilated into society at large." *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 218. The interest of the state in requiring an additional one or two years of formal high school attendance was deemed insufficient against the claim of the Old Order Amish that exposing their children to public education during the "crucial adolescent period of religious development," "would gravely endanger if not destroy the free exercise of respondents' [Old Order Amish] religious beliefs." *Wisconsin* v. *Yoder*, *supra*, 406 U.S. at 219, 223. The choice faced by the Amish parents in *Yoder* was either to risk losing their children from their faith, a process that in the long run would eliminate the sect, or to violate the law. No such choice need be made here. Although appellee claims that the payment of the tax would be a sin, it does not, as did the burden in *Yoder*, threaten the integrity of his religious beliefs. Appellee and his employees can continue freely to

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(6th Cir.), cert. denied, 414 U.S. 868 (1973). There, a 21 year old male member of the Old Order Amish sect, who had been classified by his local draft board as a conscientious objector, refused to report for alternative civilian service. Relying on *Yoder*, he argued that he deserved preferential treatment because of "the exceptional requirements which the Amish religion makes of its adherents and the disruptive effect on Amish values of a forced co-mingling with the world at large" (see 474 F.2d at 593). The court, however, rejected his argument, implicitly finding the alternative service to be a permissible burden on the free exercise of his religion.

exercise their religious beliefs with only a minor financial burden equal to that of any other employer or employee.[10]

Finally, the Court concluded in *Yoder* that the state's mandatory attendance statute, as applied to the Old Order Amish, would do little to further the reasons for enacting the statute (406 U.S. at 222). The admitted interests of the state there were to prepare its citizens to be productive members of society and to prepare them to participate in our political system. Those interests were fully satisfied both by the earlier public education accepted by the Amish and by the alternative education the children received in the Amish community. Here, by contrast,

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[10] At all events, it is doubtful whether the burden of these taxes on the religious beliefs and practices of appellee's employees is properly at issue here. Where FICA taxes are withheld from employees' wages, the employer may claim a refund on their behalf, but only if he has repaid the tax to the employees or has obtained the employees' written consent to claim a refund on their behalf. Treasury Regulation on Employment Taxes, Section 31.6402(a)-2(a)(2) (26 C.F.R.). Here, however, the taxes were not withheld from the employees' wages, and liability has been imposed solely on appellee pursuant to Section 3102(b) of the Code. Moreover, none of those employees joined in bringing this action. Consequently, with respect to the employees' share of FICA taxes here involved, the only burden that would seem pertinent to the decision is the burden imposed on appellee, as an employer, of withholding those taxes from his employees' wages and paying the withheld amounts over to the United States. Sections 3102(a) and 7501 of the Code. The burden of the FUTA taxes and the employer's share of the FICA taxes, on the other hand, must be borne by the employer in any event. Thus, while it may be appropriate here to consider how the imposition of that liability may burden the exercise of appellee's own religious beliefs, the religious beliefs of his employees have no bearing on the question of his liability for those taxes.

the governmental interest in the fiscal integrity of the social security system requires maintaining broad participation in the program (see Point B, *infra*, pages 24-29). Accordingly, *Yoder* does not support appellee's constitutional challenge to the social security taxes.

Sherbert v. *Verner*, *supra*, is similarly distinguishable. There, the Court upheld the claim of a member of the Seventh-Day Adventist Church that making unemployment compensation contingent on a willingness to work on Saturday would violate the free exercise of her religion. A member of the Seventh-Day Adventist Church was discharged by her employer because she would not work on Saturday, the Sabbath Day of her faith. She was unable to obtain other employment in the vicinity where she lived because of her religious belief that she could not work on Saturday. South Carolina denied the appellant's claim for unemployment benefits on the ground that she failed without reasonable cause to accept available employment. This Court held that disqualification of a Seventh-Day Adventist from unemployment compensation solely because of her refusal to accept employment in which she would have to work on Saturday violated the Free Exercise Clause. The appellant there was faced with a constitutionally unacceptable choice. She had to give up either her Sabbath Day or her economic means of survival. Appellee faces no comparable choice here.

To the same effect is the Court's recent decision in *Thomas* v. *Review Board*, *supra*. There, a Jehovah's Witness was transferred by his employer to a department that fabricated turrets for military tanks. He voluntarily terminated his employment, asserting

that his religious beliefs prevented him from participating in the production of weapons. The petitioner was denied unemployment benefits by Indiana on the ground that his voluntary termination was not based upon a good cause arising in connection with his work as required by the pertinent Indiana statute. This Court concluded that the case was governed by *Sherbert* v. *Verner* and that the denial of benefits accordingly violated the petitioner's free exercise of his religion. Here, by contrast, the interference occasioned by the imposition of generally imposed taxes is not comparable to the burden in *Thomas*. The proceeds of federal income, estate, and gift taxes, and miscellaneous excise taxes, may be used to fund other activities in conflict with appellee's or others' religious beliefs.[11] The burden of paying or withholding

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[11] A prime example is the supplemental security income program for the aged, blind, and disabled (42 U.S.C. 1381 *et seq.*), which was enacted as Title XVI of the Social Security Amendments of 1972, Pub. L. No. 92-603, Section 301, 86 Stat. 1329. The purpose of Title XVI of the Act was to establish a national program to provide supplemental security income to individuals who have attained age 65 or are blind or disabled, and thus to assume part of the welfare burden on state and local governments. It was estimated that in the first year of the program 6.2 million people would be eligible for benefits. H.R. Rep. No. 231, 92d Cong., 1st Sess. 147 (1971). Section 1381 note (42 U.S.C.) authorizes Congress to appropriate sums out of the general revenue sufficient to carry out this program. An example of a joint federal-state program designed to provide social welfare benefits out of the general revenue is the Aid to Families with Dependent Children (AFDC) program (42 U.S.C. 601 *et seq.*). Under this program, the federal government provides grants on a matching fund basis for states that have qualifying plans for the distribution of money for the benefit of needy children. See *King* v. *Smith*, 392 U.S. 309, 313, 316-317 (1968).

FICA and FUTA taxes upon appellee's religious beliefs is certainly no greater than the burden of the other taxes imposed upon appellee and upon the citizenry generally by the revenue statutes.[12]

B. The public need to maintain broad participation in the social security program is more substantial than the limited burden upon appellee's religious beliefs imposed by the payment of social security taxes

The district court found the burden placed by these taxes on the Old Order Amish sect to be impermissible because members of the sect consider it "a sin to fail to provide for or to allow another to provide for your own people" (J.S. App. 3a). The court concluded that "[n]ot only is it considered a sin to *accept*, it is also considered a sin to *pay*, for to pay is to deny their faith" (*ibid.*; emphasis in original). But the payment of FICA and FUTA taxes does not prevent appellee or his employees from providing for other members of their sect, nor is he or any of his employees forced to accept social security benefits. Thus, they can protect the integrity of their own religious beliefs and practices simply by declining to accept social security benefits and continuing to provide support for those members of their community who are in need. The payment of FICA and FUTA taxes no more commits appellee or other members of the Old Order Amish sect to a binding insurance contract in violation of their religious beliefs than does the payment of federal income taxes, which are

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[12] As the plurality observed in *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 606, "[s]tatutes which tax income and limit the amount which may be deducted for religious contributions [permissibly] impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church * * *."

used to support a myriad of governmental expenditures and benefits, which may be similarly opposed by them or various other religious groups. See *United States* v. *American Friends Service Committee*, 419 U.S. 7 (1974).

Moreover, there is nothing in the record showing that members of the Old Order Amish sect are opposed, on religious grounds, to the government's payment of social security and unemployment benefits to persons other than members of that sect. Indeed, even if the Old Amish were opposed to contributiing to the general welfare of persons not adhering to their own faith, it is well settled that the Free Exercise Clause of the First Amendment provides no basis for avoiding generally imposed tax obligations simply on the basis of sincerely held religious beliefs opposing the use the government makes of those revenues.[13] As the Ninth Circuit observed in *Autenrieth* v. *Cullen*, 418 F.2d 586, 588 (1969), cert. denied, 397 U.S. 1036 (1970), "[t]he Income Tax Act does not 'aid one religion, aid all religions, or prefer one religion over another.' Nor does it punish anyone 'for entertaining or professing religious beliefs or disbeliefs.'

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[13] See, *e.g.*, *Lull* v. *Commissioner*, 602 F.2d 1166 (4th Cir. 1979), cert. denied, 444 U.S. 1014 (1980); *Autenrieth* v. *Cullen*, 418 F.2d 586 (9th Cir. 1969), cert. denied, 397 U.S. 1036 (1970); *Graves* v. *Commissioner*, 579 F.2d 392 (6th Cir. 1978); *Costello* v. *Commissioner*, 34 T.C.M. (CCH) 320 (1975), aff'd mem., 76-1 U.S.T.C. ¶ 9117 (2d Cir. 1975); *Anthony* v. *Commissioner*, 35 T.C.M. (CCH) 1357 (1976), aff'd per curiam, 566 F.2d 1168 (3d Cir. 1977), cert. denied, 436 U.S. 904 (1978); *Runnings* v. *Commissioner*, 36 T.C.M. (CCH) 904 (1977), aff'd, 620 F.2d 311 (9th Cir. 1980); *United States* v. *Haworth*, 386 F. Supp. 1099 (S.D. N.Y. 1974); *Muste* v. *Commissioner*, 35 T.C. 913 (1961); *Russell* v. *Commissioner*, 60 T.C. 942 (1973).

* * * It taxes plaintiff like all others, because they are citizens or residents who have taxable income. On matters religious, it is neutral." (citations omitted.) The FICA and FUTA taxes, aiding no religion and preferring no religion over another, are likewise neutral.[14]

In contrast to the minimal, neutral effect that FICA and FUTA taxes have on the exercise of appellee's religion and that of his employees, the governmental interest in maintaining widespread participation in the social security program is very substantial. Although there is no perfect symmetry between contributions and benefits, social security benefits are, to a certain extent, dependent on the amount of taxes paid. See *Carmichael* v. *Southern Coal Co.*, 301 U.S. 495, 521-523 (1937). Appellee's FICA and FUTA taxes are commingled with other FICA and FUTA taxes and are used to support millions of other persons who need the benefits offered by the social security system. Indeed, as Congress recognized when it enacted the self-employment tax exemption of Section 1402(g) (see *infra*, pages 29-38), some individual members of the Old Order Amish sect may themselves want those benefits. H.R.

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[14] Although it sought to protect appellee's religious interest, the effect of the district court's decision is to base an employer's tax liability on the religious preference of his employees. In order to determine his own tax liability an employer would necessarily be compelled to inquire into the religious belief of each of his employees. The district court has therefore improperly interjected religious considerations into the workplace, by holding that the Constitution requires Congress to grant exemptions on grounds that would foster private discrimination in employment on the basis of religion. See *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 609 (states are not constitutionally required to adopt a system of exemptions from Sunday closing laws that would encourage private employment discrimination on the basis of religion).

Rep. No. 213, *supra*, at 12. The present social security system was established when private systems of voluntary support collapsed under the burden of all those who had no other means of survival. *Carmichael* v. *Southern Coal Co.*, *supra*, 301 U.S. at 515-518; *Steward Machine Co.* v. *Davis*, 301 U.S. 548, 586-587 (1937); *Helvering* v. *Davis*, 301 U.S. 619, 641-643 (1937); *United States* v. *Silk*, 331 U.S. 704, 710 (1947). The system's ability to take care of the nation's unemployed and retired citizens would be severely strained if all those who could provide for themselves, either by individual efforts or through other social arrangements, could voluntarily withdraw from the program based on opposition to the program on grounds of religion or conscience.[15]

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[15] Appellee has suggested (Motion to Affirm at 5) that the decision here would have little impact beyond the exemption provided for under Section 1402(g). On the contrary, however, litigation involving the constitutionality of that provision indicates that there may be far more widespread opposition to the social security system on asserted grounds of conscience and religious belief than would be encompassed by the narrow provisions of Section 1402(g). See, *e.g.*, the case cited at pages 29-30, *infra*. Surely, no distinction between the cases involving challenges to Section 1402(g) and the instant case could be drawn on the basis of an evaluation of the merits of religious beliefs of the particular taxpayers involved. *United States* v. *Seeger*, 380 U.S. 163, 184-185 (1965); *Thomas* v. *Review Board*, *supra*. Moreover, a constitutionally mandated exemption such as that adopted by the court below arguably could not be subject to the limitations placed on Section 1402(g) by Congress, such as the requirement that the group in question have been in existence since a specified date, the requirement that the Secretary of the Department of Health and Human Services determine that the group in question has had an established practice of adequately providing for its members, or, indeed, even the requirement that all rights to benefits be waived.

In the early years of the social security system, this Court soundly rejected numerous objections to the taxes imposed in support of the program, including arguments that those taxpayers who did not need the benefits provided by the system should not be burdened with the taxes. As the Court stated in *Carmichael* v. *Southern Coal Co.*, *supra*, 301 U.S. at 522-523:

> A tax is not an assessment of benefits. It is * * * a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. * * * Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve the abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good.

The imposition of social security taxes should not turn on whether members of the Old Order Amish want to participate in the system financed by those taxes. Although the sect may take care of its own members, millions of persons in this country are dependent on these taxes. As this Court recognized in *Carmichael* v. *Southern Coal Co.*, *supra*, the success of the social security system depends on the payment of taxes whether or not the individuals paying the taxes will ever receive the benefits. The social security system could not exist if those working taxpayers who do not want to pay the taxes were exempt from the taxes simply because they have an alternative means of support.

In sum, the Free Exercise Clause has never been construed to interfere with such a fundamental societal activity as the levying of generally imposed federal taxes. As this Court observed in *Gillette* v. *United States*, *supra*, 401 U.S. at 461, in terms that effectively reject appellee's claim: "Our cases do not at their farthest reach support the proposition that a stance of conscientious opposition relieves an objector from any colliding duty fixed by a democratic government." Surely, the obligation to pay generally imposed FICA and FUTA taxes is such a duty. See *Johnson* v. *Robison*, *supra*.

C. The religious exemption from the social security tax on income from self-employment does not support appellee's claim to exemption from the employer's tax on wages

As we have noted, Section 1402(g) of the Code provides a statutory exemption for members of certain religious sects from the tax imposed by Section 1401 on earnings from self-employment. But the district court erred in relying on that exemption in support of its conclusion upholding a constitutional exemption from the employer's FICA and FUTA taxes on wages. There have been, over the years since it was enacted, a number of cases in which the constitutionality of Section 1402(g) has been challenged by taxpayers who unsuccessfully sought either to have the statute set aside or to have the exemption extended to themselves, notwithstanding their failure to satisfy all of the conditions set forth in the statute. See, *e.g.*, *Kelley* v. *Terry*, No. 78-2750 (9th Cir. Aug. 27, 1980) (unpublished memorandum opinion); *Ward* v. *Commissioner*, 608 F. 2d 599 (5th Cir. 1979), cert. denied, 446 U.S. 918 (1978); *Jaggard* v. *Commissioner*, 582 F.2d 1189 (8th Cir. 1978), cert. denied, 440 U.S. 913

(1979) (*Jaggard I*); *Varga* v. *United States*, 467 F. Supp. 1113 (D. Md., 1979), aff'd by unpublished order, 618 F.2d 106 (4th Cir. 1980); *Chapman* v. *Alexander*, 421 F. Supp. 930 (W.D. La. 1976), aff'd by unpublished order, 552 F.2d 367 (5th Cir. 1977); *Escofil* v. *Commissioner*, 376 F. Supp. 521 (E.D. Pa.), aff'd mem., 493 F.2d 1400 (3d Cir. 1974); *Jaggard* v. *Commissioner*, 76 T.C. No. 19 (Feb. 12, 1981) (*Jaggard II*); *Randolph* v. *Commissioner*, 74 T.C. 284 (1980); *Hatcher* v. *Commissioner*, 37 T.C.M. (CCH) 304, aff'd, 79-2 U.S.T.C. (CCH) ¶ 9531 (10th Cir. 1978); *Lerner* v. *Commissioner*, 34 T.C.M. (CCH) 331 (1975), aff'd by unpublished order, No. 75-1770 (3d Cir. Jan. 13, 1976); *Henson* v. *Commissioner*, 66 T.C. 835 (1976); *Palmer* v. *Commissioner*, 52 T.C. 310 (1969); *Stevenson* v. *Commissioner*, 41 T.C.M. (CCH) 1121 (Mar. 19, 1981). The courts that have reached the question have uniformly concluded that the exemption provided by Section 1402(g) is constitutionally permissible.[16] and, until the decision below, no court has ever suggested that it is required under the Free Exercise Clause.

Indeed, the courts have held that conscientious objection to the social security system and the taxes designed to support that system does not constitute a valid claim to exemption under the Free Exercise

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[16] See, *e.g.*, *Jaggard* v. *Commissioner*, *supra*, 582 F.2d at 1190; *Varga* v. *United States*, *supra*, 467 F. Supp. at 1118-1119; *Lerner* v. *Commissioner*, *supra*, 34 T.C.M. (CCH) at 331 n.3. Other courts, however, have declined to reach the Establishment Clause issue raised in such cases on the theory that the taxpayer involved lacked standing to challenge the constitutionality of those provisions. See, *e.g.*, *Ward* v. *Commissioner*, *supra*, 608 F.2d at 601. Cf. *Varga* v. *United States*, *supra*, 467 F. Supp. at 1119 n.7.

Clause, whether that opposition is based merely on philosophical or "moral" principles (*e.g.*, *Varga* v. *United States*, *supra*, 467 F. Supp. at 1117-1118; *Palmer* v. *Commissioner*, *supra*, 52 T.C. at 313; cf. *Escofil* v. *Commissioner*, *supra*).[17] We submit that no principled constitutional distinction can be drawn, in regard to this question, between the sincerely held religious beliefs of a member of the Old Order Amish sect, on the one hand, and those of a Seventh-Day Adventist (*Varga* v. *United States*, *supra*; *Randolph* v. *Commissioner*, *supra*; *Palmer* v. *Commissioner*, *supra*), a Quaker (*Hatcher* v. *Commissioner*, *supra*), or a devotee of Sai Baba (*Henson* v. *Commissioner*, *supra*), on the other. Thus, while Congress may have permissibly made this accommodation under Section 1402(g) to the religious beliefs and social practices of members of the Old Order Amish sect as a matter of legislative grace, it was not compelled to do so by the Free Exercise Clause or any other provision of the Constitution.

Once having granted that statutory exemption from the tax imposed by Section 1401 on income from self-employment, Congress was under no compulsion to extend a similar exemption to employers and employees meeting the requirements of that Section from the FICA and FUTA taxes imposed by Sections 3101, 3111 and 3301 of the Code. Indeed, though appellee appears to have based his contentions, and

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[17] Such decisions are, of course, fully in accord with the similar body of cases (cited at page 29, note 13 *supra*) holding that conscientious opposition, on the basis of sincerely held religious beliefs, to the use to which the government makes of its revenues, or to contributing to such use, provides no basis under the Free Exercise Clause for avoiding the obligation to pay the full measure of income taxes imposed by Congress on all citizens.

the district court its conclusions, solely on the privileges guaranteed by the First Amendment, no Free Exercise considerations would even be affected by Congress' decision to limit the scope of the Section 1402(g) exemption to self-employment taxes. Members of the Old Order Amish sect who choose to enter the employment market place as an employer or an employee will, of course, become subject to an obligation not incurred by members of that sect who are neither employers nor employees. But this distinction is not based on religious beliefs but rests solely upon economic classifications—*viz.*, those involved in an employment relationship and those who are self-employed. Indeed, the social security tax liability that Old Amish employers and employees incur is precisely the same as that of all other employers and employees, who are subject to the taxes in question without regard to their religious persuasions or their agreement with the aims of the federal social security and unemployment benefit programs.

Moreover, this Court has consistently upheld divergent tax treatment so long as there is any rational basis for the classification. *Flint* v. *Stone Tracy Co.*, 220 U.S. 107 (1911) (federal excise tax imposed on incorporated businesses but not on similar unincorporated business upheld); *Lehnhausen* v. *Lake Shore Auto Parts Co.*, 410 U.S. 356 (1973) (Illinois statute that imposed personal property taxes on businesses but not on individuals upheld). In *Brushaber* v. *Union Pac. R.R.*, 240 U.S. 1, 24-25 (1916), this Court rejected early challenges to the progressive federal income tax enacted following the ratification of the Sixteenth Amendment, a tax structure that differentiated, among other things, between corporations and individuals, and between those with greater income

and those with lesser income. The decisions of this Court therefore establish beyond question that legislatures enacting tax statutes have "large leeway in making classifications and drawing lines which in their judgment produce reasonable systems of taxation." *Lehnhausen* v. *Lake Shore Auto Parts Co., supra*, 410 U.S. at 359. "In levying * * * taxes the most ample authority has been recognized from the beginning to select some and omit other possible subjects of taxation, to select one calling and omit another, to tax one class of property and to forbear to tax another." *Flint* v. *Stone Tracy Co.*, 220 U.S. 107, 158 (1911). See also *United States* v. *Maryland Savings-Share Ins. Corp.*, 400 U.S. 4 (1970).

Indeed, in early challenges to the Social Security Act, this Court established that Congress has considerable discretion in the classification of taxpayers in implementing the social security system. *Carmichael* v. *Southern Coal Co., supra; Steward Machine Co.* v. *Davis*, 301 U.S. 548 (1937); *Helvering* v. *Davis*, 301 U.S. 619 (1937). For example, in *Carmichael* v. *Southern Coal Co., supra*, the Court upheld a tax, enacted to support the unemployment benefits of the social security system, that exempted numerous classes of taxpayers, including employers that had fewer than eight employees, agriculture workers, domestic servants, and sailors on ships traveling on navigable waters of the United States. The tax in issue there did not apply to self-employed individuals at all.[18] In upholding the diverse classifi-

[18] The Court pointed out in *Carmichael* v. *Southern Coal Co., supra*, 301 U.S. at 508, that the imposition of a tax on the employer-employee relationship is of a type traditional in the history of Anglo-American legislation. "[T]axes on the exercise of the right to employ or be employed, were

cations at issue there, this Court reaffirmed the permissible scope of classifications for federal tax purposes (*Carmichael* v. *Southern Coal Co.*, *supra*, 301 U.S. at 509; citations omitted):

> This Court has repeatedly held that inequalities which result from a singling out of one particular class for taxation or exemption, infringe no constitutional limitation.
>
> * * * * *
>
> Like considerations govern exemptions from the operation of a tax imposed on the members of a class. A legislature is not bound to tax every member of a class or none. It may make distinctions of degree having a rational basis, and when subjected to judicial scrutiny they must be presumed to rest on that basis if there is any conceivable state of facts which would support it.

While self-employed persons were brought within the scope of the social security system in 1950 (Social Security Act Amendments of 1950 ch. 809, Section 208, 64 Stat. 540), even now self-employed persons are taxed on a substantially different basis from employed individuals. Sections 1401 and 1402. Given the decisions in *Carmichael* v. *Southern Coal Co.*, *Helvering* v. *Davis*, and *Steward Machine Co.* v. *Davis*, *supra*, it could hardly be contended that the distinction between self-employed persons and employees under either the original provisions of the Social Security Act or its present provisions is constitutionally questionable. The specific distinction

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known in England and the Colonies before the adoption of the Constitution, and must be taken to be embraced within the wide range of choice of subjects of taxation" reserved by the Constitution. See *Steward Machine Co.* v. *Davis*, *supra*, 301 U.S. at 548, 578-580.

drawn, in Section 1402(g), between self-employed adherents of the Old Order Amish sect and members of that sect who employ or are employed by others is no more suspect than the distinctions that have been drawn between self-employed and employed persons generally.

In sum, the classification made in Section 1402(g) involves at most a difference in the tax treatment accorded employed and self-employed members of the same religious sect. Moreover, since appellee himself is treated in precisely the same manner, with respect to the FICA and FUTA taxes in question, as any other similarly situated employer, regardless of his religious beliefs, there is hardly any room for him to complain that, as to himself, Section 1402(g) reflects an improper classification under either the Due Process Clause or the Free Exercise Clause.

At all events, we submit that Congress had a rational basis for limiting the Section 1402(g) exemption to the tax imposed on self-employment income under Section 1401 of the Code. The legislative history of Section 1402(g) shows that Congress was concerned that there would be no broad exception to the strongly held policy against making participation in the social security system a voluntary matter. Thus, the exemption was limited to the self-employment tax "since those persons for whom the payment of social security taxes appears to be irreconcilable with their religious convictions also, by reason of their religious beliefs, limit their work almost entirely to farming and to certain other self-employment." H.R. Rep. No. 213, 89th Cong., 1st Sess. 101-102 (1965). The Treasury supported this restriction because "these sects established in farming communities * * * could be more certainly relied upon to identify and provide for their dependent and elderly members than those

in the mobile and transcient urban environment." *Social Security: Hearings on H.R. 6675 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess., Pt. 2, 1003 (1965).

Limiting the Section 1402(g) exemption to self-employment taxes is a reasonable classification because it distinguishes between self-employed persons, who are most likely to possess the economic resources necessary to provide for themselves, and those persons, employees, whose support may be dependent on someone else. It was reasonable for Congress to assume that even if it so desired, a religious group such as the Old Amish, might not, in fact, be able to provide adequately for all its members who depend on employment for their livelihood either in periods of high unemployment, or in periods during which such individuals are otherwise unable to find gainful employment. It was likewise reasonable for Congress to require that where such individuals depart from their traditional self-employment activities and actively participate in the economic community as employees or employers of others, they should be called upon to contribute to the social security system in the same measure as all other employers and employees, whether or not they ultimately choose to partake in the benefits of that system.[19]

Indeed, it must be remembered that appellee's employees (or their survivors) are free, if they so

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[19] As this Court recognized more than 40 years ago, the shift from an agrarian to an industrial society brought with it social ills that could be rectified only by government intervention. In turning aside arguments against a tax passed by Alabama to support the unemployment compensation segment of the social security system, the Court stated: "[U]nemployment apparently has become a permanent incident of our industrial system. * * * * * Although employment in Alabama is predominantly in agriculture, and the court below

desire, voluntarily to change their religious affiliation in the future, and there is also the possibility that they could otherwise become ineligible for economic support from their religious community. Exclusion of those wage earners and their survivors from social security coverage in favor of anticipated care for their needs by their religious community, therefore, could arguably amount to a form of governmental economic coercion on them to maintain their religious affiliation in good standing—a result in significant tension with Establishment Clause values. We submit that the Constitution does not require Congress to follow that course. Instead, where, as here, either the granting or the withholding of such an exemption necessarily implicates some tension with the pertinent constitutional values, Congress should be afforded a measure of discretion to fashion what it deems to be a reasonable and just accommodation. Cf. *Braunfeld* v. *Brown*, *supra*, 366 U.S. at 608 (Sabbatarian exemption from Sunday closing laws is constitutionally permissible but not constitutionally required). See also, *e.g.*, *Walz* v. *Tax Commission*, 397 U.S. 664 (1970); *Zorach* v. *Clausen*, 343 U.S. 306 (1952); *Everson* v. *Board of Education*, 330 U.S. 1 (1947) (all involving accommodations held constitutionally permissible, but not necessarily constitutionally required).

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found that agricultural unemployment is not an acute problem, the census reports disclose the steadily increasing percentage of those employed in industrial pursuits in Alabama." *Carmichael* v. *Southern Coal Co.*, *supra*, 301 U.S. at 515, 517. Realizing that employees are more vulnerable to economic distress than the self-employed, distinctions drawn in Section 1402(g) between an employer-employee relationship and the self-employed (particularly farmers) have been consistently made since the social security system was first enacted.

In sum, Section 1402(g) represents a reasonable accommodation between the interest of the government in insuring maximum participation in, and contribution to, the social security system, on the one hand, and the possibly conflicting beliefs of certain religious groups, on the other. *Committee For Public Education* v. *Nyquist*, *supra*, 413 U.S. at 788. In attempting to implement purely neutral, secular goals through the social security system, Congress has tried to minimize, as a matter of legislative grace, otherwise justifiable burdens on members of religious groups like the Old Order Amish, without transgressing the restrictions of the Establishment Clause. *Social Security: Hearings on H.R. 6675 Before the Senate Comm. on Finance*, 89th Cong., 1st Sess., Pt. 2, 996-1000 (1965); see *Walz* v. *Tax Commission*, *supra*, 397 U.S. at 669. The balance Congress has carefully struck does not violate the First Amendment rights of appellee or the other members of the Old Order Amish sect whom he employs.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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APPENDIX

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 1402. DEFINITIONS.

* * * * *

(g) [as added by Section 319(c), Social Security Amendments of 1965, Pub. L. No. 89-97, 79 Stat. 396; as amended by Section 1901(a), Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1789] MEMBERS OF CERTAIN RELIGIOUS FAITHS.—

(1) *Exemption.*—Any individual may file an application (in such form and manner, and with such official, as may be prescribed by regulations under this chapter) for an exemption from the tax imposed by this chapter if he is a member of a recognized religious sect or division thereof and is an adherent of established tenets or teachings of such sect or division by reason of which he is conscientiously opposed to acceptance of the benefits of any private or public insurance which makes payments in the event of death, disability, old-age, or retirement or makes payments toward the cost of, or provides services for, medical care (including the benefits of any insurance system established by the Social Security Act). Such exemption may be granted only if the application contains or is accompanied by—

(A) such evidence of such individual's membership in, and adherence to the tenets or teachings of, the sect, or division thereof as the Secretary [or his delegate] may require for purposes of

determining such individual's compliance with the preceding sentence, and

(B) his waiver of all benefits and other payments under titles II and XVIII of the Social Security Act on the basis of his wages and self-employment income as well as all such benefits and other payments to him on the basis of the wages and self-employment income of any other person,

and only if the Secretary of Health, Education, and Welfare finds that—

(C) such sect or division thereof has the established tenets or teachings referred to in the preceding sentence,

(D) it is the practice, and has been for a period of time which he deems to be substantial, for members of such sect or division thereof to make provision for their dependent members which in his judgment is reasonable in view of their general level of living, and

(E) such sect or division thereof has been in existence at all times since December 31, 1950.

An exemption may not be granted to any individual if any benefits or other payment referred to in subparagraph (B) became payable (or, but for section 203 or 222(b) of the Social Security Act, would have become payable) at or before the time of the filing of such waiver.

* * * * *

(3) *Period For Which Exemption Effective.*—An exemption granted to any individual pursuant to this subsection shall

apply with respect to all taxable years begining after December 31, 1950, except that such exemption shall not apply for any taxable year—

(A) beginning (i) before the taxable year in which such individual first met the requirements of the first sentence of paragraph (l), or (ii) before the time as of which the Secretary of Health, Education, and Welfare finds that the sect or division thereof of which such individual is a member met the requirements of subparagraphs (C) and (D), or

(B) ending (i) after the time such individual ceases to meet the requirements of the first sentence of paragraph (l), or (ii) after the time as of which the Secretary of Health, Education, and Welfare finds that the sect or division thereof of which he is a member ceases to meet the requirements of subparagraph (C) or (D).

* * * * *

SEC. 3101 [as amended by Section 321(b), Social Security Amendments of 1965, *supra*] RATE OF TAX.

(a) *Old-Age, Survivors, And Disability Insurance.*—In addition to other taxes, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121 (b))—

* * * * *

(b) [as added by Section 321(b), and amended by Sec. 111(G)(5), Social Security Amendments of 1965, *supra*] *Hospital Insurance.*—In addition to the tax imposed by the preceding subsection, there is hereby imposed on the income of every individual a tax equal to the following percentages of the wages (as defined in section 3121(a)) received by him with respect to employment (as defined in section 3121(b)—

* * * * *

SEC. 3102. DEDUCTION OF TAX FROM WAGES.

(a) [as amended by Section 205A, Social Security Amendments of 1954, ch. 1206, 68 Stat. 1093; Section 201(h)(3), Social Security Amendments of 1956, ch. 836, 70 Stat. 841, and Section 313(c)(2), Social Security Amendments of 1965, *supra*] *Requirement.*—The tax imposed by section 3101 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid. An employer who in any calendar quarter pays to an employee cash remuneration to which paragraph (7)(B) or (C) or (10) of section 3121(a) is applicable may deduct an amount equivalent to such tax from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar quarter is less than $50; and an employer who in any calendar year pays to an employee cash remuneration to which paragraph (8)(B) of section 3121(a) is applicable may deduct an

amount equivalent to such tax from any such payment of remuneration, even though at the time of payment the total amount of such remuneration paid to the employee by the employer in the calendar year is less than $150 and the employee has not performed agricultural labor for the employer on 20 days or more in the calendar year for cash remuneration computed on a time basis; and an employer who is furnished by an employee a written statement of tips (received in a calendar month) pursuant to section 6053(a) to which paragraph (12)(B) of section 3121(a) is applicable may deduct an amount equivalent to such tax with respect to such tips from any wages of the employee (exclusive of tips) under his control, even though at the time such statement is furnished the total amount of the tips included in statements furnished to the employer as having been received by the employee in such calendar month in the course of his employment by such employer is less than $20.

* * * * *

SEC. 3111 RATE OF TAX.

(a) [as amended by Section 321(c), Social Security Amendments of 1965, *supra*] *Old-Age, Survivors, And Disability Insurance.*—In addition to other taxes, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121(a)) paid by him with respect to employment (as defined in section 3121(b))—

* * * * *

(b) [as added by Section 321(c), and amended by Section 311(c), Social Security Amendments of 1965, *supra*] *Hospital Insurance.*—In addition to the tax imposed by the preceding subsection, there is hereby imposed on every employer an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 3121 (a) and (t)) paid by him with respect to employment (as defined in section 3121(b))—

* * * * *

SEC. 3301 [as amended by Section 301(a), Employment Security Amendments of 1970, Pub. L. No. 91-373, 84 Stat. 713] RATE OF TAX.

There is hereby imposed on every employer (as defined in section 3306(a)) for the calendar year 1970 and each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3.2 percent of the total wages (as defined in section 3306(b)) paid by him during the calendar year with respect to employment (as defined in section 3306(c)).

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